85-1318

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH ADAMICK, et al.,

Petitioners,

vs.

DONALD HODEL, Secretary of the Department of the Interior, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH SUGGESTION FOR REMAND PURSUANT TO 28 U.S.C. 2106 FOR WANT OF A FINAL ORDER PURSUANT TO 28 U.S.C. s.1291

APPENDIX TO PETITION

JANICE M. HAYES, ESQ.
3391 S. El Camino Road
Las Vegas, Nevada 89102
Attorney for Petitioners
Telephone: (702) 871-5135

January 31, 1986

APPENDIX TO PETITION FOR CERTIORARI

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Order of the Interior Board of Land Appeals setting aside decisions of Nevada BLM. Entered August 20, 1980	9
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Order of the Court of Appeals in instant case, No. 84-1894, rejecting appellants' contention that there was no final Order from the District Court. Entered December 21, 1984	18a
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FILED
OCT -2 1985

CLERK, U.S.
COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH ADAMICK, JANINE ADAMICK, Individually and as Administratrix of the ESTATE OF KATHLEEN JO PRICE, Deceased, APRIL ADAMICK and JANICE HAYES,	
Plaintiffs-Appellants,	No. 84-1894
v.	D.C. No. CV 81-586 RDF
DONALD HODEL, Secretary of the Department of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES BUREAU OF LAND MANAGEMENT, ROBERT BURFORD, Director of the Bureau of Land Management, EDWARD F. SPANG, Nevada State Director of the Bureau of Land Management,	MEMORANDUM*
Defendants-Appellees.	

Appeal from the United States District Court for the District of Nevada
Honorable Roger D. Foley, District Judge, Presiding

Argued and Submitted May 16, 1985-
San Francisco, California

Before: POOLE and NELSON, Circuit Judges,
and CURTIS, District Judge**

Appellants sued various federal officials and agencies (the government) in connection with their applications to obtain

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

permits for entry onto desert lands under the Desert Land Act, 43 U.S.C. §§ 321-39 (1982). The district court denied appellants' motion for summary judgment, granted summary judgment for the government, and denied both appellants' motion to alter or amend judgment under Fed. R. Civ. P. 59 (e), and their request to file an amended complaint. We affirm.

A motions panel of this court rejected appellants' argument that jurisdiction was lacking over their appeal because the district court did not enter a final appealable order. In granting summary judgment for the government, the district judge ruled upon all of the claims asserted in appellants' complaint. Additionally, appellants' arguments to us concerning the Bureau of Land Management's determination that the subject land was unsuitable for entry were not properly before the district court. The classification decision occurred

after appellants filed their complaint. Appellants did not seek leave to amend their complaint until after summary judgment against them was entered. They did not make a motion to amend, but requested leave to amend in their motion to alter or amend the district court's judgment. The district judge did not abuse his discretion by denying appellants leave to amend their complaint at that time. See Dan Caputo Co. v. Russian River County Sanitation District, 749 F. 2d 571, 574 (9th Cir. 1984).

Since a challenge to the Bureau of Land Management's land classification decision was not part of appellants' complaint, it was not properly before the district court. While appellants raise this issue on appeal, we do not generally consider an issue for the first time on appeal absent exceptional circumstances. Taylor v. Sentry Life Insurance Co., 729 F.2d 652, 655 (9th Cir. 1984). Appellants have failed to

demonstrate exceptional circumstances.

The district court granted the government summary judgment on appellants' claims under the Freedom of Information Act, 5 U.S.C. § 552 (1982). We review de novo, Loehr v. Ventura County Community College District, 743 F.2d 1310, 1313 (9th Cir. 1984), and affirm. In response to the Bureau of Land Management's showing by affidavits that it complied with appellants' request for information, appellants failed to present countervailing evidence or affidavits to support their position that they were entitled to additional materials. Entry of summary judgment against appellants was therefore appropriate. Fed. R. Civ. P. 56(e); see Coca—Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254 (9th Cir 1982).

Summary judgment was also proper on the issue whether appellants' Desert Land Entry applications and their associated preference rights are assignable. Appellants based

this claim upon a letter they received from an Associate Solicitor of the Department of the Interior which stated that the Department would not recognize such assignments. They did not have, and do not currently have, any applications to assign; their applications, moreover, were rejected by the Bureau of Land Management. There were no allegations in the complaint that appellants assigned any applications, or that they sought and were denied recognition in a final decision by the Interior Department. Thus, appellants have not presented an actual "case or controversy" for purposes of Article III of the Constitution--since they did not allege a distinct and palpable injury fairly traceable to the government's actions, they lack standing to assert this claim. See Allen .v. Wright, 104 S.Ct. 3315, 3325 (1984).

The remaining issues raised by appellants also lack merit. The district court did not abuse its discretion in regulating discovery. See Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984). Moreover, appellants never moved in district court to compel appellees, their counsel, and a magistrate to answer questions concerning possible conflicts of interest. Nor did they move to disqualify any of these individuals.

Insofar as appellants' request that this court "mandate that Defendants-Appellees investigate alleged irregularities in administration of the Desert Land Act program in Nevada" is a prayer for mandamus relief, it is denied. Mandamus relief is an extraordinary remedy reserved for exceptional circumstances, and appellants have fallen far short of the showing that is necessary to obtain such relief. See United States v. Harper, 729

F.2d 1216, 1221-22 (9th Cir. 1984). Finally, since they have not substantially prevailed in this lawsuit, appellants are not entitled to attorney's fees under 5 U.S.C. § 552 (a) (4) (e).

AFFIRMED.

UNITED STATES DEPARTMENT OF THE

INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 Wilson Boulevard

Arlington, Virginia 22203

August 20, 1980

IBLA 80-628 ELEANOR E. VOLKMAR	: :	N 23490 Desert Land Entry
IBLA 80-727, 784 APRIL ADAMICK	: :	N 24086, N 24012 Desert Land Entry
IBLA 80-766 JOSEPH J. ADAMICK	: :	N 23365, N 23973 Desert Land Entries
IBLA 80-767, 785 JANICE HAYS	: : : :	N 24087, 23316, 23888, 23900, 24088 Desert Land Entries
IBLA 80-768 KATHLEEN JO ADAMICK PRICE	: : :	N 23366 Desert Land Entry
IBLA 80-769 JANINE ADAMICK	: :	N 23364 Desert Land Entry
	:	Decisions set aside and cases remanded

ORDER

The above identified parties have each appealed decisions of the Nevada State Office, Bureau of Land Management (BLM), rejecting the captioned desert land entry applications. Each rejection was based on the fact that the applicant intended to cultivate an arid land species of plant known as the jojoba plant. BLM ruled that cultivation of jojoba would not meet the requirement of the regulations, 43 CFR Part 2520. The decisions were based on BLM Instruction Memorandum No. 80-383, dated March 14, 1980, and entitled "Public Inquiries on the Availability of Public Lands for the Cultivation of Arid Land Species," but no factual data or analysis on the cultivation of the jojoba plant was included in any of the case files transmitted to this Board.

Eleanor E. Volkmar and April Adamick (for IBLA 80-727) timely filed brief statements of reasons to refute the BLM conclusions. In each of the other appeals, the appellants filed timely requests for extensions of time to submit a statement of reasons because BLM had not yet supplied them with requested information concerning the basis of the rejections on which they could then base their statements of reasons. The Board granted a time extension to Kathleen Jo Adamick Price until October 14, 1980, and to Janice Hayes for IBLA 80-785 until September 22, 1980. The remaining requests for time extensions have not been acted on.

We understand that a jojoba fact report has been prepared by BLM for its field offices. All appellants should be given an opportunity to comment on this report, particularly in light of the

requests to BLM for additional information.

In a recent decision styled Joanne F. Wright, 49 IBLA 237 (1980), the Board set aside three identical rejections of desert land applications and remanded the case for consideration of the extensive data and analyses submitted by the appellants and for readjudication of the applications.

In order that all desert land entry applications involving the cultivation of the jojoba plant will be treated uniformly and the issues considered together, we will set aside the subject decisions and remand the cases to BLM for readjudication. We request BLM to serve a copy of the jojoba facts report on each appellant and provide a reasonable time period for comment. If after review of all submissions BLM again determines that cultivation of the jojoba plant will not support a desert land entry and that the

subject applications must be rejected for that reason, the record must reflect a reasoned basis for such determination. In readjudicating these applications, BLM should also examine each and determine whether the application is deficient for any other reason under the Act and regulations.

In view of this order, the time extensions granted to Kathleen Jo Adamick Price and Janice Hayes for submissions to this Board are mooted and, therefore, are vacated. The remaining requests for extensions are also mooted by this Order. Any additional submissions should be sent to BLM for consideration. In the event of any future adverse action by BLM, the appellants will have a right to appeal that action to this Board, unless it is a classification action pursuant to 43 CFR 2450.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions below are set aside and the records remanded for further action consistent with this order.

Joan B. Thompson
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Douglas E. Henriques
Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

WASHINGTON, D.C. 20240

March 25, 1981

Ms. Janice Hays
Attorney at Law
6343 Concho Lane
Las Vegas, Nevada 89102

Dear Ms. Hayes:

This is in further response to your Freedom of Information Act request remanded to the Bureau of Land Management (BLM) for further processing by the Department of the Interior's Freedom of Information Act Officer--Appeals.

The remand was made on a recommendation by the Department's Office of the Solicitor on the basis that our original decision did not appropriately consider the release of information contained in approximately 2880 applications for Desert Land Entry which had not been rejected at that time.

Since the time of your initial request approximately 1200 applications have been rejected and two have been approved. However, many more applications have been received and there are now nearly 2800 applications which have not been processed.

We grant access to these applications:

Each application includes the following:

*Two pages of instructions

*Five pages of completed responses

*Two pages of testimony signed by witnesses

*A sketched map responsive to item 11 on the entry form

*A serial page added to the application by BLM

*A voucher showing payment in funds by the applicant

In addition, many of the applications include a separate estimated budget plan of development in response to item 13(b) on the entry form. These plans vary in length and type of information provided.

Photo copy fees are five cents per page of copy reproduced on a standard office duplicating machine in sizes up to 8½" X 13". For copies of photographs, slides, maps, or other special documents or services, the charge is the direct cost of such services or materials to the Government.

Because your requests indicate that you are interested only in certain information which may be contained on the applications, and because copying costs could be prohibitive, I suggest that you work with the Nevada State Office to arrange to view these records or to narrow your request to include only the documents that will provide the information you need.

I suggest that you contact Roger Jarrell, Chief, Lands and Minerals Operations, (720) 784-5703, to arrange to view these documents.

Sincerely,

Eleanor R. Schwartz

Freedom of Information Officer

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 21 1984

JOSEPH ADAMICK, et al., Plaintiffs-Appellants, vs. WILLIAM CLARK, Secretary of the Department of the Interior, et al., Defendants-Appellees	NO. 84-1894 DC# CV-81-586, RDF Nevada (Las Vegas) ORDER

Before: SNEED and BOOCHEVER, Circuit Judges

In their opening brief, plaintiffs contend that the district court's disposition of the action was not final and that we have no jurisdiction over their appeal. We have considered the parties' memoranda submitted in accordance with our order of October 16, 1984, and reject this contention. Plaintiffs obviously take issue with the district court's disposition on a number of grounds, but no claims remain to be decided in the district court and the appeal is properly before us.

Appellees shall file their brief within 15 days of the date of entry of this order.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

RECEIVED
AND FILED
AUG 5 8:03 AM '82
CAROL FITZGERALD
BY: Patricia Lamb
Deputy

JOSEPH ADAMICK, et al.	)	
	)	Civil-LV-
Plaintiffs	)	586-RDF
	)	MINUTES OF
vs.	)	THE COURT
	)	
JAMES G. WATT, etc., et al.,	)	Dated: August 5, 1982

PRESENT:
THE HONORABLE ROGER D. FOLEY, UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: PATRICIA LAMB

REPORTER: NONE APPEARING

COUNSEL FOR PLAINTIFF(S): NONE APPEARING

COUNSEL FOR DEFENDANT(S): NONE APPEARING

MINUTE ORDER IN CHAMBERS

IT IS ORDERED that Plaintiffs' Motion for Amendment of Findings of Fact and Conclusions of Law, and for Additional Findings, filed December 4, 1981, is

denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Review in Part of Order of Magistrate, entered on March 24, 1982, filed April 2, 1982, is denied.

IT IS FURTHER ORDERED that Plaintiffs' Request that Court Grant Plaintiffs' Motion for Review in Part of the Order of the Magistrate as Motion hs not been Opposed, filed April 30, 1982, is denied.

IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration of Magistrate's Order entered June 7, 1982, filed June 21, 1982, is denied.

CAROL C. FITZGERALD,
CLERK

CR 100

By Patricia Lamb 64
Deputy Clerk

ENTERED

MAR 25 1982

CLERK, U.S.
DISTRICT COURT
DISTRICT OF
NEVADA
By Patricia Lamb
Deputy

RECEIVED
AND FILED
MAR 24 8:52 AM '82

CAROL FITZGERALD,
CLERK
By Patricia Lamb
Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * * * * * * *

JOSEPH ADAMICK, ET AL.,	)	CIV LV
	)	81-586,
Plaintiffs,	)	RDF
	)	
	)	O R D E R
v.	)	
	)	
JAMES G. WATT, Secretary of the Interior, ET AL.,	)	
	)	
	)	
Defendants.	)	
	)	

The Motion of Plaintiffs to Compel Production of Documents and Motion for Order Directing that James Watt or Authorized Agent Respond for Defendants, Plaintiffs' Motion to Compel Defendants to Fully Answer Plaintiffs' First Set of

Interrogatories, and Plaintiffs' Motion to Compel Defendants to Fully Answer Plaintiffs' Second Set of Interrogatories came on regularly for hearing on March 16, 1982, before the Honorable Philip M. Pro, United States Magistrate.

The matters having been argued and submitted and good cause appearing therefor, IT IS ORDERED:

1. Defendants are ordered, at Plaintiffs' expense, to produce copies of the Serial Register Pages of all Desert Land Entries filed with the Bureau of Land Management in the State of Nevada subsequent to January 1, 1979. Defendants are also ordered to make available to Plaintiffs for copying, at Plaintiffs expense, at their offices at 300 Booth Street, in Reno, Nevada, all Desert Land Entry Application files filed subsequent to January 1, 1979. Said files will be available for Plaintiffs'

inspection and copying for a two week period commencing on March 30, 1982. Plaintiffs shall have the right to copy, at their expense, any document contained in any of said Desert Land Entry Application files. Except as provided herein, the remainder of Plaintiffs' Motion to Compel Production of Documents is denied.

2. Plaintiffs' Motion for an Order Directing that James Watt or Authorized Agent Respond for Defendants is denied.

3. Plaintiffs' Motion to Compel Defendants to Fully Answer Plaintiffs' First Set of Interrogatories is denied.

4. Plaintiffs' Motion to Compel Defendants to Fully Answer Plaintiffs' Second Set of Interrogatories is denied.

5. The deposition of Interior Secretary Watt or his designee may be taken on a date convenient to the parties.

IT IS FURTHER ORDERED that, pursuant to Local Rule 17(A)2, the deadline for the completion of all discovery shall be extended to June 28, 1982.

IT IS FURTHER ORDERED that the parties shall strictly comply with the provisions of Rule 17(A)4(b) of the Rules of Practice of the United States District Court for the District of Nevada, prior to bringing further discovery motions before the Court.

DATED: March 23, 1982

PHILIP M. PRO
United States
Magistrate

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAS VEGAS, NEVADA

RECEIVED
AND FILED

Jan 16 4:34 PM '84

Carol C. Fitzgerald
Clerk

By: Jacqueline Rowlett
Deputy

JOSEPH ADAMICK, et al.,

Plaintiffs,

vs.

JAMES G. WATT, Secretary of the Interior, et al.,

Defendants.

Civil-LV 81-586, RDF

MINUTES OF THE COURT

Dated: January 16, 1984

ENTERED
Jan. 17, 1984
Clerk, U.S. District Court, District of Nevada
By: Jacqueline Rowlett

PRESENT:
THE HONORABLE ROGER D. FOLEY SENIOR
UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: PRESTON BLUIETT, JR.

REPORTER: NONE APPEARING

COUNSEL FOR PLAINTIFF(S): NONE APPEARING

COUNSEL FOR DEFENDANT(S): NONE APPEARING

MINUTE ORDER IN CHAMBERS XXXX

IN COURT PROCEEDINGS:

IT IS ORDERED:

1. The Plaintiffs' Cross-Motion fo Partial Summary Judgment and for Specifi Performance of Contract (#163), filed Jun 7, 1983, is denied.

2. The Plaintiffs' Motion for Revie of Order Combining Summary Judgment Motion for Hearing and Plaintiffs' Motion to Hol Defendants' Motion for Summary Judgment i Abeyance (#169), filed November 28, 1983 are denied.

3. The Plaintiffs' Ex Parte Motion for Continuance of Hearin on Motions for Summary Judgment (#174) filed January 6, 1984, is denied.

CR 179 CLERK, U.S. DISTRICT COURT

EXHIBIT By_____
Deputy Clerk

LAMOND R. MILLS
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSEPH ADAMICK, et al., Plaintiffs, vs. JAMES WATT, SECRETARY OF THE INTERIOR, et al., Defendants.	)	Civil No. CV-LV-81-586, RDF SUPPLEMENTAL AFFIDAVIT OF MR. WILLIAM K. STOWERS

COMES NOW the United State of America, by and through Lamond R. Mills, United States Attorney, . . . and submits this affidavit of Mr. William K. Stowers, Chief, Lands and Withdrawal Review Section, Branch of Lands and Mineral Operations for the Bureau of Land Management, as a supplement to defendants' opposition to plaintiffs' cross-motion for partial summary judgment and for specific performance of contract, filed June 3, 1983 which was filed with this Court of June 20, 1983.

LAMOND R. MILLS

1/ Emphasis supplied.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSEPH ADAMICK, et al.,	)	
	)	
Plaintiffs	)	Civil No.
	)	CV-LV-81-586,
v.	)	RDF
	)	
JAMES G. WATT, Secretary of the Interior, et al,	)	
	)	
Defendants	)	
	)	

Declaration

William K. Stowers declares as follows:

1. I am the Chief, Lands and Withdrawal Section for the Bureau of Land Management, Department of the Interior in Reno, Nevada.

2. This office has supplied plaintiffs' attorney 2305 first pages of Desert Land applications filed in Nevada.

3. . . . As of July 11, 1983, 2550 applications had been closed, 16 entries had been allowed with 1825 applications remaining to be processed. . .

William K. Stowers
July 19, 1983

FILED

DEC 20 1983

PHILLIP B. WINBERRY
Clerk U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH ADAMICK, APRIL ADAMICK, KATHLEEN JO PRICE, JANICE HAYS and JANICE ADAMICK, Petitioners. vs. WILLIAM P. CLARK, Secretary of the Interior, Respondent.	No. 83-7599 ORDER

Before: CHOY, HUG and FERGUSON,
Circuit Judges

Respondent's motion to dismiss this case for lack of jurisdiction is granted and the case is DISMISSED.

FILED
JAN. 24, 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH ADAMICK, et al.,	)	No. 83-7599
Petitioners,	)	
vs.	)	
SECRETARY OF THE DEPARTMENT OF THE INTERIOR WILLIAM CLARK,	)	
Respondent.	)	ORDER

Before: CHOY, Circuit Judge

Petitioner's motion for an extension of time to file a petition for rehearing or a motion for reconsideration is denied. The mandate shall issue forthwith.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

October 14, 1983

Ms. Janice M. Hayes
Attorney at Law
3391 S. El camino Road
Las Vegas, Nevada 89102

Dear Ms. Hayes:

. . .

. . . With regard to final classification orders and your Motion of September 3, the Secretary of the Interior is bound by the regulations at 43 CFR 2450.6(a), which provide: "a final order of the Secretary shall continue in full force and effect so long as the lands remain subject to classification . . . until an authorized officer revokes or modifies it . . ."

. . .

. . . Thus, the Nevada State Director's decision was not a reclassification as alleged. As to the petiioner/applicants' priority filing rights,you may be assured that they will not be extinguished so long as associated litigation is before the federal courts.

(Signature illegible)
Assistant Secretary of Land
and Water Resources

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-7599

JOSEPH ADAMICK, et al.

Petitioners,

V.

JAMES WATT, SECRETARY OF THE INTERIOR

Respondent

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW FOR WANT OF JURISDICTION

. . .

1 Petitioners' applications are still pending before the Nevada BLM Director; the land classification determination that petitioners seek to have this court review was made in a separate proceeding (Case No. CV-LV-81-586). In addition, as noted in the petition for review, petitioners have filed an action in the United States District Court for the District of Nevada, alleging that certain information has been unlawfully witheld (sic) by the

Department of the Interior. Adamick v. Watt, No. Civ. LV-81-586. That action is still pending.

(Information in parentheses "Case No. CV-LV-81-586" added. Case No. 81-586, the instant action was the only action filed in teh district court.)

The Desert Land Act, 43 U.S.C. 321 et seq.,

§ 321. Entry right generally; extent of right to appropriate waters

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of 25 cents per acre--to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: **Provided, however,** That the right to the use of water by the person so conducting the same, on or to any tract of desert

land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon

making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment to such officer of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him. Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under sections 321 to 323, 325, and 327 to 329 of this title. However, in that entry one or more tracts may be included, and the tracts may be included, and the tracts so entered need not be contiguous. The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres, and all the tracts entered by one person shall be

sufficiently close to each other to be managed satisfactorily as an economic unit, as determined under rules and regulations issued by the Secretary of the Interior.

43 C.F.R. 2450.2

Preliminary determination.

Upon the filing of a petition-application, the authorized officer shall make a preliminary determination as to whether it is regular upon its face and, where there is no apparent defect, shall proceed to investigate and classify the land for which it has been filed. No further consideration will be given to the merits of an application or the qualifications of an applicant unless or until the land has been classified for the purpose for which the petition-application has been filed.

43 C.F.R. 2450.6

Effect of final order.

(a) A final order of the Secretary shall continue in full force and effect so long as the lands remain subject to classification under the authorities cited in Subpart 2400 until an authorized officer revokes or modifies it. Until it is so revoked or modified, all applications and petition-applications for the lands not consistent with the classification of lands will not be allowed. Any payments submitted therewith will be returned. If the order is revoked or modified, the land will be opened to entry on an equal opportunity basis after public notice in accordance with applicable regulations for the purpose for which it may be classified.

(b) Nothing in this section, however, shall prevent the Secretary of the Interior, personally and not through a delegate, from vacating or modifying a final order of the

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Secretary. In the event that the Secretary vacates or modifies a final order within sixty days of the date it became final, any preference right of a petitioner-applicant will be restored.

43 C.F.R. 2521.2 (d)

(d) Evidence of water rights required with application. No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right.

Sept. 16, 1981

JANICE HAYES
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSEPH ADAMICK, JANINE ADAMICK, APRIL ADAMICK, JANICE HAYES, KATHLEEN JO PRICE, Plaintiffs, v. JAMES G. WATT, Secretary of the Department of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, ROBERT F. BURFORD, Director of the Bureau of Land Management, EDWARD F. SPANG, Nevada State Director of the Bureau of Land Management, Defendants.	CIVIL ACTION NO. CV-LV-81-586, RDF COMPLAINT

COME NOW, JOSEPH ADAMICK, JANINE ADAMICK, APRIL C. ADAMICK, JANICE M. HAYES and KATHLEEN JO PRICE (hereinafter

"Plaintiffs"), by and through their attorney, Janice Hayes, and complain and allege of Defendants as follows:

FIRST CAUSE OF ACTION

I

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331(a), 5 U.S.C. §§ 702-706, 28 U.S.C. § 28 U.S.C. § 1361 and 28 U.S.C. §§ 2201 and 2202, as hereinafter more fully appears. Venue is placed in the District Court of Nevada by virtue of 28 U.S.C. § 1391(e). The land in question is located in the County of Clark, State of Nevada.

28 U.S.C. § 1361 provides that the District Courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to a plaintiff.

28 U.S.C. § 2201 provides that in a case of actual controversy within its

jurisdiction any Court of the United States may declare the right and other legal relations of any interested party seeking such declaration.

5 U.S.C. § 702 provides that a person suffering legal wrong because of agency action is entitled to judicial review thereof.

5 U.S.C. § 706 provides that the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed.

II

PARTIES

Plaintiffs are citizens of the State of Nevada residing in Las Vegas, Nevada. Defendant JAMES G. WATT (hereinafter "Secretary") is Secretary of the Interior of the United States responsible under 43 U.S.C. § 2 for the performance of all executive duties pertaining to the public lands of the United States. The

Defendant BUREAU OF LAND MANAGEMENT, (hereinafter "BLM") is an agency of the defendant UNITED STATES DEPARTMENT OF THE INTERIOR ("Department"), and pursuant to 43 U.S.C. § 1, is headed by a Director. Defendant ROBERT F. BURFORD, (hereinafter "Director"), is the duly appointed and acting Director. Defendant EDWARD F. SPANG, ("State Director") is the duly appointed and acting Director of the Nevada State BLM Office.

III

STATEMENT OF THE CASE

This is not an appeal from an adverse final decision of an agency. Plaintiffs have obtained favorable decisions from the Interior Board of Land Appeals ("Board") and the Department's Freedom of Information Act appeals division. Plaintiffs' complaint concerns agency inaction.

The Secretary has failed to compel

the State Director to comply with the Board's remand order that BLM readjudicate Plaintiffs' Desert Land Entry ("DLE") applications, which order was entered more than a year ago, on August 20, 1980, and to furnish records and information in compliance with a Freedom of Information appeal remand order of March 12, 1981.

Plaintiffs seek an order in the nature of a writ of mandamus and a preliminary injunction.

IV

On January 1, 1979, then Secretary of the Interior Cecil Andrus lifted a fifteen-year moratorium which had been imposed on applications for entry in Nevada under the Desert Land Act, as amended, 43 U.S.C. § 321, et seq. ("Act"). The Act provides for the sale of up to 320 acres of land at $1.25 per

acre to applicants who are willing and able to irrigate and cultivate a tract designated as desert land.

The Nevada BLM selected 8 million acres of the approximately 49 million acres of land held by the federal government in Nevada and distributed maps showing that these lands were suitable for entry and open to DLE applications. Plaintiffs filed applications during the "simultaneous filing period" which ended April 2, 1979. Their applications were designated by BLM as N 24012, N 24086 (April Adamick), N 23365, N23973 (Joseph Adamick), N 23364 (Janine Adamick), N 23316, 23888, 23900, 24087, 24088 (Janice Hayes) and N23366 (Kathleen Price).

V

Plaintiffs designated alfalfa, sudan and wheat grass as intended crops and subsequently amended their applications to show the jojoba bean as the proposed

crop.

VI

The Nevada Director sent notices to Plaintiffs that their applications would be rejected unless certain deficiencies, primarily related to irrigation maps and plans, and incomplete answers were corrected. Plaintiffs supplemented and resubmitted their applications, which applications were then accepted by the Director.

VII

Various newspaper articles quoted Nevada BLM spokespersons as stating that approximately 200 DLE applications had been granted. BLM failed and refused to provide information regarding the names and addresses of said applicants, the location of their tracts of land, the proposed crop, irrigation system and source of water and whether water permits had been obtained and if so, the date of

acquisition.

VIII

By decisions dated May 23, 1980, May 26, 1980 and June 9, 1980, the State Director rejected plaintiffs' applications based on his determinations that (1) the jojoba bean did not qualify under the Act as a proposed crop; (2) the economic feasibility of growing jojoba cannot be demonstrated and (3) that the capability of a given tract to support the cultivation of jojoba could not be determined.

These were the only reasons given for rejection. No other deficiencies or omissions in the applications were alleged.

IX

Plaintiffs filed appeals to the Board and moved for extensions of time to submit statements of reasons, citing

BLM's refusal to provide needed information.

By Order dated August 20, 1980, the Board of Land Appeals set aside BLM's determinations and remanded the cases to the Nevada BLM with instructions that BLM readjudicate Plaintiffs' applications, give a reasoned basis for its decision and provide the information that had been requested by plaintiffs. A copy of the Board's Order is attached hereto and incorporated herein by reference as Exhibit 1.

X

The State Director failed and refused to comply with the Board's order, although requested many times to do so by plaintiffs.

Upon inquiry, the Board advised plaintiffs that it had not retained jurisdiction on remand and could not compel discovery.

Plaintiffs therefore filed an appeal to the Secretary under the Freedom of Information Act. The SECRETARY adopted the findings of the Acting Associate Solicitor and by Order dated March 12, 1981, remanded the appeal to the Nevada BLM with instructions that it furnish the above-mention information as to all applications which had not been rejected. Said Order is attached hereto and incorporated herein by reference as Exhibit 2. BLM did not file any objections to the Order or move to vacate or modify the order.

XI

The Nevada BLM, without readjudicating Plaintiffs' DLE applications, notified Plaintiffs' by decisions dated March 26, 1981, that their applications would be rejected unless certain alleged "deficiencies," relating to irrigation maps and proof of

acquisition of a water supply, were corrected. Said notices specifically stated that the decisions were not appealable orders. Plaintiffs resubmitted their applications, without waiving their objections that their prior applications were satisfactory and of equal or better quality and completeness as those submitted by other applicants which had been accepted and processed by BLM and forwarded to the Las Vegas District Office for further studies and surveys.

XII

Plaintiffs filed an Objection in the Nevada State Office and subsequently, on May 30, 1981, they also filed a Motion for Summary Judgment or in the alternative, Petition for Writ of Mandamus in the Board of Land Appeals. A copy of said motion is attached hereto and incorporated herein as Exhibit 3.

XIII

By letter dated July 8, 1981, Administrative Judge Gail M. Frazier advised plaintiffs that the Board did not retain continuing jurisdiction over their cases and that "unless and until BLM issues an adverse decision with respect to them (plaintiffs' applications) and an appeal is properly filed, this Board will not act in the matter."

The SECRETARY has not responded to Plaintiffs' requests for assistance.

XIV

Plaintiffs are, therefore, in a more disadvantageous position than if the Board's Order had been adverse. The Nevada BLM refuses to readjudicate their applications and enter a decision and the Board will not act until BLM enters an adverse decision, nor will the Board or Secretary direct BLM to comply with the remand orders and grant discovery.

Plaintiffs' only recourse is to seek the aid of this Honorable Court. Plaintiffs have been and will continue to be harmed by the DEPARTMENT's inaction. Water supplies in Nevada are limited and there is not enough to support all the DLE applications for entry that have been filed. Plaintiffs will be irreparably harmed if other applications are granted prior to theirs.

XV

The actions and decisions of the State Director are arbitrary, capricious and an abuse of discretion, and are otherwise not in accordance with law, and are supported by no evidence and are discriminatory as to Plaintiffs. The Nevada BLM has demanded that plaintiffs furnish evidence of acquisition of water rights while not requiring said proof of other applicants. BLM has transmitted other applications to the Las Vegas

District Office for further surveys and reports, notwithstanding that said other applicants have submitted no proof of water rights.

XVI

Defendants' actions are subject to judicial review within the meaning of 5 U.S.C. § 704. This court has the power to compel agency action unlawfully withheld or unreasonably delayed pursuant to 5 U.S.C. § 706(1).

XVII

Defendants owe plaintiffs the plain duty under the Desert Land Act to process their applications according to the procedures set forth and contemplated by such Act and according to the same standards applied to other applicants.

XVIII

Plaintiffs are entitled to an order to compel defendant officials to

readjudicate their DLE applications, enter an order which can be appealed if adverse, or transmit their applications to the Las Vegas District Office for further processing or grant their applications for entry.

SECOND CAUSE OF ACTION

Plaintiffs incorporate herein by reference the allegations contained in Paragraphs 1 through XVIII and makes them a part hereof as if fully set forth herein.

XX

The State Director has failed and refused to furnish information pertaining to other DLE applicants in a timely fashion as he was directed to do by the Board and the Department. Plaintiffs offered to compromise and to accept photocopies of the first pages of all DLE applications with the right to obtain copies of any other pages, irrigation

maps and evidence of water rights upon request. The State Director has unnecessarily delayed in providing said copies of the first pages.

XXI

The State Director has failed and refused to furnish the names and addresses of other "jojoba appellants," and to disclose the disposition of other appeals to the Board of Land Appeals. The Board impliedly suggested that all appeals based on rejections on the basis that jojoba was the proposed crop should be heard and determined together.

XXII

The State Director maintains that only two applications have been granted for entry under the Act in Nevada. Plaintiffs allege that either other applicants have been granted or that the State Director has made agreements with

other applicants and has preselected which applications will be granted. Plaintiff seek full disclosure pertaining to granting of entries.

XXIII

Plaintiffs requested copies of the evidence submitted by other applicants in support of their affirmative answers to Question 12(b) on their applications that they had acquired or would obtain a right to the permanent use of sufficient water to irrigate and reclaim all of the land applied for. Plaintiff JANICE HAYES' letters dated July 25, 1981 and July 27, 1981 are attached hereto and incorporated herein by reference as Exhibits 4 and 5.

The Nevada BLM advised plaintiffs that it did not have such proof or evidence and that the applications of other applicants which did not contain such proof had been forwarded to the Las Vegas District office and processed in

error and that said applications would be recalled. A Memorandum from the Nevada BLM dated August 24, 1981 listing some of said applications which did not contain proof of water rights is attached hereto and incorporated herein by reference as Exhibit 6.

Plaintiffs are informed and believe and thereon allege that said applications have not been returned to the Nevada State Office in Reno, Nevada.

XXIV

Public Law No. 89-292 authorized the Secretary of the Interior to construct, operate and maintain the Southern Nevada Water Project which provides water from the Colorado River. The Colorado River Commission, as the administrative agency, contracts through Boulder City, Henderson, City of North Las Vegas, Nellis Air Force Base and the Las Vegas

Valley Water District to distribute water to the general public by sale. The land for which Plaintiffs have applied is within the area served by the Las Vegas Valley District.

Defendants have failed and refused to furnish to plaintiffs information regarding individuals, associations or corporations that have contracted with any of the above-listed entities or with Defendants to purchase water from the Southern Nevada Water Project.

XXV

Plaintiffs are entitled to an order to compel defendants to comply with their own discovery orders and to furnish the information requested as set forth hereinabove in Paragraphs XIX through XXIV.

THIRD CAUSE OF ACTION

XXVI

Plaintiffs incorporate herein by

reference the allegations contained in Paragraphs 1 through XXV and makes them a part hereof as if fully set forth herein.

XXVII

Before a DLE application is granted, BLM must transmit applications to District offices for environmental, cultural, historical and land use studies and surveys. The State Director has failed and refused to transmit plaintiffs' applications and has transmitted applications filed several months later than plaintiffs', thus giving other applicants priority in time over plaintiffs. As there are insufficient water supplies in Nevada to permit all applications for entry, plaintiffs will be irreparably harmed if other applications are granted prior to theirs.

XXVIII

Unless enjoined and restrained by

orders of this Court, defendants will grant rights of entry to other applicants which will foreclose Plaintiffs' rights to obtain entry. Granting of other applications will result in irreparable harm, injury and damage to plaintiffs and plaintiffs will be unlawfully and wrongfully deprived of property rights, the value of which can not be determined at this time.

XXIX

Plaintiffs have no plain, speedy or adequate remedy at law for the continuing and future injury being perpetrated by Defendants' conduct and inaction.

FOURTH CAUSE OF ACTION

XXX

Plaintiffs JOSEPH ADAMICK, APRIL ADMAICK and JANICE HAYES submitted more than one DLE application. An individual may

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For a decree ordering defendant Edward Spang to readjudicate their DLE applications on the issues presented in the decisions and to transmit said applications to the Las Vegas District BLM Office for further processing, or alternatively, for a decree ordering defendants to grant plaintiffs' DLE applications.

2. For an order directing defendants to provide all the information requested by plaintiffs in their Second Cause of Action.

3. For a preliminary injunction enjoining and restraining defendants from taking any action on any applications other than plaintiffs' which will adversely affect plaintiffs' rights, including but not limited to, granting a right of entry to any other applicant, transmitting any other applications to district offices, processing or conducting studies pertaining to any

other applications, reimposing a moratorium on DLE entries in Nevada or destroying or allowing amendments to any applications heretofore filed by other DLE applicants, as set forth in Plaintiffs' Motion for a Preliminary injunction, filed herewitn with this Complaint.

4. For costs and disbursements necessarily incurred herein and for reasonable attorney's fees;

5. For a declaratory judgment that assignation of plaintiffs' applications will relate back to the date of filing of said applications; and

6. For such other and further relief as the Court shall deem meet and proper in the premises.

DATED this 15th day of September, 1981

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